ARAB-MALAYSIAN CREDIT BHD

v.

SAUJANA KINABALU SDN BHD & ORS AND ANOTHER CASE

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
ABDUL RAHMAN SEBLI JC
[CIVIL SUITS NO: S22-20-2005 & S22-24-2005]
25 JANUARY 2010

CONTRACT: *Void contract - Non-compliance with statute - First defendant executed agreements for lease of express buses from plaintiff - Agreements actually money-lending transactions - Transactions illegal and void for non-registration under s. 4 Bills of Sale Act 1950 - Whether plaintiff owned buses - Whether ownership issue only determinable from proved facts of case - Sale of Goods Act 1979 [UK], ss. 17 & 18*

The first defendant, as lessee, entered into four lease agreements with the plaintiff, as lessor, in respect of four new express buses. The second and third defendants, who were directors of the first defendant, guaranteed the company's repayments under the agreements. Two of the lease agreements were later varied to extend the payment period of the monthly rentals. When the first defendant defaulted in repayments, the plaintiff, after repossessing and selling three of the four buses, filed a claim against the defendants for the amounts owing under the lease and variation agreements. The defendants contended the lease and variation agreements were actually money-lending transactions which were void and unenforceable. The court was faced with the question whether the agreements were disguised as leasing agreements to overcome the provisions of the Bills of Sale Act 1950 and/or the Bills of Sale Ordinance (Sabah) and whether they also contravened the Banking and Financial Institutions Act 1989 ('BAFIA'), thus making the agreements void and unenforceable.

A crucial issue the court had to determine was whether the plaintiff actually owned the buses to be able to lease them out. Contrary to the defendants' contention in this regard, the plaintiff maintained they were the owners as (i) even though the first defendant paid RM42,000 as deposit for each bus the balance purchase price of RM378,000 for each bus was paid by the plaintiff (ii) although the buses were registered in the first defendant's name, the registration card of the vehicles had an endorsement of ownership claim by the plaintiff (iii) all the lease

agreements described the plaintiff as the owner of the buses and (iv) the plaintiff did not disburse any monies to the first defendant but made all payments direct to the coachbuilders for construction of the buses.

Held (dismissing the claim with costs to be taxed unless agreed):

(1) The lease and variation agreements were for all intents and purposes money-lending transactions disguised as lease agreements. The transactions were therefore illegal and void for non-registration under s. 4 of the Bills of Sale Act 1950. (para 24)

(2) The transaction was consistent with a loan (with the buses as security) rather than a lease. The sum released by the plaintiff was a loan with the buses as security to be sold off if the defendants failed to repay the loan. (para 24)

(3) The evidence showed the buses were purchased by the first defendant and not the plaintiff. The first defendant, having paid the deposits, was unable to settle the balance purchase price and sought a loan from the plaintiff. It was a credit sale of the buses to the first defendant on the undertaking the plaintiff would pay the balance of the purchase price. The property and title to the buses had passed to the first defendant by virtue of ss. 17 and 18 of the Sale of Goods Act 1979. (The Malaysian Sale of Goods Act 1957 is not applicable to Sabah and Sarawak. By virtue of s. 5 of the Malaysian Civil Law Act 1956, the applicable law is the United Kingdom Sale of Goods Act 1979 - editor) (paras 19, 22 & 24)

(4) The second and third defendants could not be held liable as guarantors pursuant to void and unenforceable agreements. (para 28)

Case(s) referred to:

AmFinance Bhd v. KT Steel Sdn Bhd & Ors [2008] 1 CLJ 290 HC ***(refd)***

BSNC Leasing Sdn Bhd v. Sabah Shipyard Sdn Bhd & Ors & Another Appeal [2000] 2 CLJ 197 CA ***(refd)***

Credit Corp (M) Sdn Bhd v. KM Basheer Ahamed KM Maghdoom Mohideen & Anor [1985] 2 CLJ 351; [1985] CLJ (Rep) 94 FC ***(refd)***

Goh Bak Tun v. Kuching Port Authority [1985] 1 LNS 98 HC ***(refd)***

Low Hock Jee v. Mayban Finance Berhad [1996] 2 CLJ 479 HC ***(refd)***

Major Kassim Shariff v. Kwong Yik Finance Bhd [2001] 6 CLJ 397 HC ***(refd)***

Mayban Finance Bhd v. Bumino Sdn Bhd [1992] 3 CLJ 1728; [1992] 3 CLJ (Rep) 47 HC ***(refd)***

MBf Finance Bhd v. Low Ping Ming [2005] 1 CLJ 305 CA ***(refd)***

Sinta Jackson & Ors v. Arab Malaysian Credit Bhd [2000] 1 LNS 36 HC ***(refd)***

Soosan Trading Co Ltd v. Tawau Auto Sdn Bhd & Ors [1997] 4 CLJ Supp 519 HC ***(refd)***

Legislation referred to:
Banking and Financial Institutions Act 1989, ss. 2, 60
Bills of Sale Act 1950, s. 4
Evidence Act 1950, ss. 92, 102

Sale of Goods Act 1979 [UK], ss. 17, 18

For the plaintiff - Francis Wong Kum Heng; M/s William Liaw Chan & Co
For the defendants - Zaleha Mohd Yusuf Pan; M/s Peter Lo & Co

Reported by Ashok Kumar

JUDGMENT

Abdul Rahman Sebli JC:

The Background Facts

[1] The plaintiffs, a credit company incorporated in Malaysia provided leasing facilities to the 1st defendant company for four new Express buses. Four equipment lease agreements were executed between the plaintiffs and the 1st defendant in respect of the four buses. The 2nd and 3rd defendants who are the directors of the 1st defendant stood as guarantors to the 1st defendant.

[2] The 1st defendant ran into financial difficulties and was unable to service the leasing facilities. Two of the leasing agreements were then varied to provide for extension of the payment of the monthly rentals from 60 months to 96 months in respect of two of the buses. This was done through two variation agreements both dated 28 May 1999. The 1st defendant however was still unable to keep up with payment of the monthly rentals. As a result three of the buses were repossessed by the plaintiffs, two disposed of by way of tender while one was sold by way of auction. The fourth one has yet to be repossessed as the plaintiffs claim that they are still unable to locate its whereabouts.

The Claim

[3] The plaintiffs' claim, *inter alia*, is for the following reliefs:

(a) In respect of bus No. SA7619P which has not been repossessed, the sum of RM395,169.20;

(b) In respect of bus No. SA7618P, the sum of RM320,022.68;

(c) In respect of bus No. SS7013D, the sum of RM564,285.37;

(d) In respect of bus No. SS7012D, the sum of RM487,524.00.

A **Issues To Be Tried**

[4] The agreed issues to be tried are the following:

(a) Whether the equipment lease agreements and the variation agreements were money lending transactions disguised as leasing agreements to overcome the provisions of the Bills of Sale Act, 1950 and/or the Bills of Sale Ordinance (Sabah) and is therefore void and unenforceable.

(b) Whether the lease and variation agreements were in contravention of s. 60 of the Banking and Financial Institutions Act 1989 and therefore null and void and unenforceable.

(c) Whether the plaintiffs can carry on the business of leasing.

(d) Whether the 2nd and 3rd defendants were discharged as guarantors.

(e) Whether the defendants were indebted to the plaintiffs in the sum claimed.

(f) Whether the plaintiffs failed to mitigate their losses, if any.

[5] The first and second issues are interrelated although they relate to different legislations. I shall therefore deal with them together. The defendants' contention is that the lease and variation agreements were money lending transactions disguised as equipment lease agreements and are therefore void and unenforceable. The Federal Court in *Credit Corp (M) Sdn Bhd v. KM Basheer Ahamed KM Maghdoom Mohideen & Anor* [1985] 2 CLJ 351; [1985] CLJ (Rep) 94 defined an equipment lease agreement as follows:

> A lease is defined as a contract between a lessor and lessee for the hire of a specific asset selected from a manufacturer or vendor of such asset. The lessee has possession and use of the asset on payment of specified rentals over a period.

[6] Under s. 2 of the Banking and Financial Institutions Act 1989 ("the BAFIA") "leasing business" is defined to mean:

> (a) the business of letting or sub-letting moveable property on hire for the purpose of the use of such property by the hirer or any other person in any business, trade, profession or occupation or in any commercial, industrial, agricultural or other economic enterprise whatsoever and, where the lessor is the owner of the property, regardless whether the letting is with or without an option to purchase the property, but does not include the business of hire-purchase which is subject to the Hire-Purchase Act 1967; and for the purpose of this definition, "moveable

> property" includes any plant, machinery, equipment or other chattel attached or to be attached to the earth or fastened or to be fastened, permanently or otherwise to anything attached to the earth.

[7] The first question to ask in relation to the first and second agreed issues to be tried is, who actually owns the buses which the plaintiffs purportedly "leased" to the 1st defendant? One cannot lease out something which one does not own. It is common ground that if the buses were not owned by the plaintiffs under the lease agreements, then the transactions were not leasing transactions within the meaning of s. 2 of the BAFIA.

[8] The plaintiffs' contention is that they were at all material times the owners of the four buses, for the following reasons:

(i) The 1st defendant had paid RM42,000 as deposit for each of the four buses and the balance of the purchase price in the sum of RM378,000 for each of the buses was paid by the plaintiffs.

(ii) The buses were registered in the name of the 1st defendant company with an endorsement of ownership claim by the plaintiffs on the registration card of the vehicles.

(iii) All the lease agreements in respect of all the buses clearly state that the plaintiffs are the owners of the buses.

(iv) All payments were made directly to Hup Lee Coachbuilders Sdn Bhd ("Hup Lee"). No monies were disbursed by the plaintiffs to the 1st defendant.

[9] The defendants however contended otherwise. Their case is that even though the plaintiffs were described as owners in the lease agreements, this is not conclusive of the status of the plaintiffs. Reliance was placed on the Court of Appeal decision in *MBf Finance Bhd v. Low Ping Ming* [2005] 1 CLJ 305 where the court said:

> It is settled law that in order for the agreement to qualify as a valid hire purchase agreement the appellants must have been the owners of the vehicle at the time of its execution. A description of them as the owners in the agreement is not conclusive of the status. That was made manifestly patent in the instructive judgment of this court in *BSNC Leasing Sdn Bhd v. Sabah Shipyard Sdn Bhd & Ors* [2000] 2 CLJ 197. Neither can it be said that the fact that the vehicle has been registered in the name of the respondents means that the title to it could not have passed to the appellants.

[10] In dealing with the word "owner" the court referred to *Goh Bak Tun v. Kuching Port Authority* [1985] 1 LNS 98; [1986] 1 MLJ 408 where Tan Chiaw Thong J said at p. 410:

> In this connection the Oxford English Dictionary defines 'owner', *inter alia*, as one who owns or holds something as his own; a proprietor; one who has the rightful claim or title (though he may not be in possession).
>
> The definition of 'owner' therefore includes a person who has a rightful claim or title to a thing. This raises the question of whether the ownership claim to the vehicle by the appellants makes them the owners of the vehicle even though it is registered in the name of the respondents. It must be remembered that the registration card is not a document of title (see *Sajan Singh v. Sardara Ali* [1960] MLJ 52; *Mohamed Mydin v. Ramiah* [1965] 1 MLJ 33). This means that even though a motor vehicle remains registered in the name of the seller it does not prevent the property in it passing to a buyer who has purchased it. It depends on the facts of a particular case.

[11] The case of *MBf Finance Bhd* deals with a hire purchase agreement but in my view the principles are equally applicable to lease agreements. The plaintiffs on their part also rely on MBf Finance Bhd, but for a different proposition. The judgment is cited to support their argument that the endorsement of ownership claim on the registration card means that the plaintiffs were the owners of the buses. The relevant passage in the judgment that is relied upon is the following:

> In the circumstances the endorsement of the ownership claim on the registration card on the vehicle means that the respondents cannot deal with the vehicle without the consent of the appellants as they have a claim to the title of the vehicle. This makes the appellants the owners of the vehicle for all intents and purposes. The claim of the appellants will prevail over the interests of the respondents even though they are registered as the owners.

[12] With due respect to learned counsel for the plaintiffs, the passage must be considered in its proper factual context. It is clear that the Court of Appeal in that case decided in favour of the appellant because the facts showed that the appellant was indeed the owner of the vehicle, having reaffirmed the rule that whoever is the owner of the subject matter depends on the facts of a particular case. The case did not lay down a rule of thumb that an ownership claim endorsed on the registration card must be taken as proof of ownership.

[13] In *AmFinance Bhd v. KT Steel Sdn Bhd & Ors* [2008] 1 CLJ 290 Syed Ahmad Helmy J (as he then was) made the following observations on a similar issue:

> There is no evidence on record to show that the ownership of the Equipment was purchased or transferred to or belonged to the plaintiff. It is pertinent to note that in the agreement dated 20 March 1997 between the plaintiff and the first defendant under the form and heading of Equipment Lease Agreement the plaintiff expressly covenanted that the "Lessor has agreed to purchase/has purchased the Equipment" and hence the plaintiff to my mind has the onus of proving that they have assumed the ownership of the Equipment through documentary evidence which onus the plaintiff have failed to discharge. It is trite that in determining whether the lease agreement is a lease agreement what matters most is the substance and not the form and it is also trite that for a lessor to lease the equipment they must be seized with ownership which the evidence herein is lacking.

[14] Therefore the question of who owned the buses, whether it is the plaintiffs or the 1st defendant, is a question that has to be determined having regard to the proved facts, and not by a mere reference to the terms of the lease agreements or to the registration cards or to the endorsement of ownership on the registration cards.

Evidence And Finding On Ownership

[15] The court must look behind the lease agreements to discover their true nature and see if the facts represented are true. In the lease agreements, as was the case in *AmFinance Bhd*, the plaintiffs represented as follows:

> Whereas at the request of the Lessee the Lessor has agreed to purchase/has purchased the Equipment described in the Schedule hereto for the purpose of leasing the same to the Lessee ...

[16] If these words were to be taken at their face value, the plaintiffs were of course the owners of the buses. But do they represent the actual truth? Having regard to the evidence, this is farthest from the truth. In the first place there is absolutely no evidence that the plaintiffs had at the request of the 1st and 2nd defendants agreed to purchase the buses for the purpose of leasing them to the 1st defendant. The evidence in fact points to the opposite direction. The testimonies of Ng Tia Ching (PW1) the Marketing and Credit Officer of the plaintiffs' Kuala Lumpur branch at the material time and Chey Wai Ling (PW4) the Senior Manager of the plaintiffs' Kuala Lumpur branch (now Senior Manager of AmBank (M) Bhd) unmistakeably show that it was the 2nd defendant who intended to purchase the buses from Hup Lee and not the plaintiffs. The evidence further shows that it was the 1st defendant who had a contract with Hup Lee for the fabrication of the buses and not the plaintiffs. There is no evidence that the construction of the buses

was at the instance of the plaintiffs so that the plaintiffs could lease them to the 1st defendant. In cross-examination PW1 was asked to confirm if the plaintiffs did not purchase the buses from the 1st defendant and his answer was an unequivocal "yes". He was then asked if the plaintiffs had any contract or agreement with Hup Lee to fabricate the buses and his answer was:

> No, it is just based on invoice.

[17] PW1 however did not produce the relevant invoices to support his claim. The invoices at pp. 48, 50 and 57 of encl. 119 are not evidence as they were never produced and marked as exhibits during the trial. At the conclusion of the trial they remained documents for identification only which means the contents have not been proved. Unproved documents are worthless as evidence. Thus the testimonies of PW1 and PW4 inclusive of their witness statements on these invoices are of no evidential value. The invoices at pp. 176 and 234 of encl. 118 support the 1st defendant's case rather than the plaintiffs' case. These invoices clearly show that the buses were sold and invoiced to the 1st defendant and not the plaintiffs. In the further cross examination of PW1 the Q & A proceeded as follows:

> Q: Q.23.1 of your statement. Do you agree with me that what the 2nd defendant told you was that Hup Lee had agreed to fabricate the buses for him and he needed financing from your bank?
>
> A: No, the 2nd defendant wanted to purchase buses from Hup Lee.

[18] It was put to PW4 in cross-examination that the defendants informed her that they needed a loan to pay for the construction of the buses and PW4's answer was "They applied for a loan." Now, if a loan was applied for, then in all probability a loan it was that the plaintiffs granted to the 1st defendant and not any other facility. Given the total lack of evidence that the buses had been purchased by the plaintiffs, there is no basis for this court to arrive at the conclusion that the plaintiffs were the owner of the buses.

[19] It is relevant to note that after the buses were fabricated and sent to Sandakan by Hup Lee they were registered under the name of the 1st defendant. There was no reservation of title by Hup Lee. The lease agreements were signed by the 1st defendant a few days after the buses were sent to Sandakan, and only then were they sent to Kuala Lumpur for PW4 to sign. The endorsements of ownership were also made after the plaintiffs had paid the balance of the purchase price. In my view these facts, together with the fact that the buses were not purchased by

the plaintiffs, mean that the property and title to the buses had passed to the 1st defendant by virtue of ss. 17 and 18 of the Sale of Goods Act 1979 which is applicable to Sabah as decided in *Low Hock Jee v. Mayban Finance Berhad* [1996] 2 CLJ 479 and *Soosan Trading Co Ltd v. Tawau Auto Sdn Bhd & Ors* [1997] 4 CLJ Supp 519.

[20] In *BSNC Leasing Sdn Bhd v. Sabah Shipyard Sdn Bhd & Ors & Another Appeal* [2000] 2 CLJ 197 the Court of Appeal ruled as follows:

> In the absence of a contrary intention, property in specific goods passes to the buyer at the time the contract is made. And it matters not whether the parties have postponed either payment for, or delivery of, the goods.

[21] What about the plaintiffs' contention that since the balance purchase price of RM378,000 for each bus was paid by the plaintiffs (the 1st defendant only paid the deposits), the 1st defendant could not have been the owner? The defendants' evidence on this point is that all the deposit payments of RM42,000 for each bus was made to Hup Lee by DW2 as part payment for the fabrication of the buses (see DW2's witness statement at "DWS2" p. 27). This part of DW2's evidence was not challenged at all in cross-examination and is therefore deemed to be admitted. The same goes with his evidence at p. 3 of DWS2 where he said:

> To finance the fabrication of the buses and the purchase of the chassis, Hup Lee arranged for a loan for me from the plaintiff.

[22] If indeed the plaintiffs had intended to purchase the buses the fabrications would have been done at their instance. To my mind this is not a case where the plaintiffs bought the buses by paying Hup Lee the purchase price in full and then let them on hire to the plaintiffs but rather a case where the 1st defendant, having paid the deposits, was unable to settle the balance on its own and had to seek a loan from the plaintiffs. It was a credit sale of the buses to the 1st defendant on the undertaking that the plaintiffs would pay the balance of the purchase price. The facts are not dissimilar to the facts in *Major Kassim Shariff v. Kwong Yik Finance Bhd* [2001] 6 CLJ 397.

[23] In any event the fact that the plaintiffs paid for the balance of the purchase price is not conclusive proof that they were the owner of the buses because that fact is equally consistent with the fact that the plaintiffs had granted a loan to the 1st defendant. The testimony of PW4 in this regard is that Hup Lee was informed by the plaintiffs that the "loan" had been approved after which Hup Lee proceeded to construct the buses.

[24] On the evidence and having regard to the probabilities of the case, the four buses in my judgment were purchased by the 1st defendant and not the plaintiffs and the reason the defendants approached the plaintiffs was because they needed the funds to finance the purchase. I accept the defendants' evidence on this point. The transaction in my view is more consistent with a loan (with the buses as security) rather than a lease. It is my finding that the sum released by the plaintiffs was a loan with the buses as security, to be sold off if the defendants failed to repay the loan. I have no doubt that the lease and variation agreements were for all intents and purposes money lending transactions disguised as lease agreements. The transactions are therefore illegal and void for non registration under s. 4 of the Bill of Sales Act 1950.

[25] Learned counsel for the plaintiffs submitted that s. 92 of the Evidence Act 1950 prohibits admission of oral evidence to contradict the terms of the lease agreements, which state that the plaintiffs had purchased the buses. *Sinta Jackson & Ors v. Arab Malaysian Credit Bhd* [2000] 1 LNS 36 was cited in support. With due respect to learned counsel the question of contradicting the terms of the lease agreements does not arise because the issue in this case is whether there is evidence that the plaintiffs had purchased the buses, as represented, and not whether oral evidence had been adduced to contradict the representation. The burden is on the plaintiffs to prove that they had purchased the buses because their claim would fail if no evidence at all were given on either side as to who owned the buses: s. 102 of the Evidence Act 1950. As decided by the Court of Appeal in *MBf Finance Bhd*, the description of "owner" in the agreement is not conclusive of the status. *Sinta Jackson & 2 Ors* is also not authority for saying that the court cannot look behind the lease agreements to discover their true nature.

Whether The Plaintiffs Can Carry On The Business Of Leasing

[26] This issue was raised by the defendants following an amendment to the statement of defence at the tail end of the trial. It was argued that the plaintiffs being a credit company is not entitled to carry on a leasing business. The plaintiffs' answer is that they are permitted to do so by the BAFIA. Reference was made to s. 2 which defines "finance company business" to include "leasing business". I agree with the plaintiffs. The case of *Mayban Finance Bhd v. Bumino Sdn Bhd* [1992] 3 CLJ 1728; [1992] 3 CLJ (Rep) 47 cited by learned counsel for the defendants has no relevance having regard to the meaning of "finance company business" given by the BAFIA. Mayban Finance Bhd was decided under the Finance Companies Act 1969 which has been repealed by the BAFIA.

[27] Notwithstanding that, to pass the test of "leasing business" within the meaning of s. 2 of the BAFIA, the plaintiffs must in the context of the lease agreements prove that they were the owners of the buses which, as discussed above they were not.

Issues 4, 5 And 6 Of The Issues To Be Tried

[28] In view of my finding on the first, second and third issues, the rest of the issues are *non-sequitur*. The 2nd and 3rd defendants could not be held liable as guarantors pursuant to void and unenforceable agreements.

Conclusion

[29] On the totality of the evidence produced by both sides at the trial and for reasons stated above, the only conclusion I can arrive at is that the plaintiffs have failed to prove their claim against the defendants on the balance of probabilities. In the circumstances the claim is dismissed with costs, to be taxed unless agreed.